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BEFORE THE

Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	))	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	))	MM Docket No. 87-8

EMERGENCY PETITION FOR STAY

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Dated: May 4, 2001

SUMMARY

Sinclair Broadcast Group, Inc. ("Sinclair") petitions the Commission to stay the requirement that Sinclair terminate certain local marketing agreements ("LMAs") pending judicial review of the orders establishing that requirement in *Sinclair Broadcast Group, Inc. v. FCC*, (D.C.Cir., Case No. 01-1079). The stay will preserve the status quo and will prevent irreparable injury resulting from the termination of the LMAs while the court determines the legality of the termination requirement, and will cause no harm to other parties or to the public interest.

Sinclair will suffer irreparable injury absent grant of the stay. Sinclair has invested millions of dollars in the stations with which it has LMAs to enable them to air quality programming, including local news and public affairs programs, and to improve their facilities. Sinclair based these investments on the reasonable expectation that it would realize a return over the long term. The value of this investment will be dramatically affected by the required premature termination. Neither the court nor the Commission will be able to compensate Sinclair for these losses. Sinclair will in effect be penalized for its efforts to create additional voices in the market. It is highly unlikely that Sinclair will be able to reenter the relationships or similar relationships in the future and the losses will therefore be permanent. Forced termination would also preclude Sinclair from exercising editorial discretion in connection with the LMAs, thereby irreparably harming Sinclair's freedom of speech, and would unconstitutionally take Sinclair's property rights without just compensation.

The injury to Sinclair is far more compelling than the harm on the basis of which the District of Columbia Circuit stayed the divestiture by Viacom Inc. and CBS Broadcasting Inc. (collectively "Viacom") of certain television stations. *See Fox Television Stations, Inc. v. FCC*, No. 00-1222 (D.C.Cir. Apr. 6, 2001). Viacom was granted a stay because it had an appeal

pending of an established rule imposing a national cap on television ownership that it knew about. In contrast, when Sinclair entered into the LMAs, they were entirely permissible and there was no rule precluding them. While Sinclair would not be completely ousted from any of its markets, it would like Viacom suffer substantial disruption of its business operations in those markets and a substantial part of its business would be destroyed.

Sinclair is also likely to prevail on the merits. The orders requiring termination of the LMAs are grounded on an "eight voices standard" that is based solely on conjecture and intuition rather than logic or empirical evidence. Because the requirement to terminate the LMAs does not advance any important governmental interest and in any case burdens more speech than is necessary to further any supposed interest based on "intuition," it violates the First Amendment. Moreover, forced termination of the LMAs will have a dramatic impact on the value of Sinclair's distinct investment-backed expectations about the value of contracts that were made in reliance on the fact that the Commission's rules permitted LMAs, and therefore constitutes an unconstitutional taking under the Fifth Amendment without justification or compensation. Indeed, the eight voices standard is so lacking in logic or evidentiary support that it is arbitrary and capricious. The standard is fatally inconsistent with the Commission's radio-television cross ownership rule, and is irrational because it is not tailored to the known realities in differing markets.

TABLE OF CONTENTS

Summary i

Emergency Petition For Stay 1

I. Background 2

- A. History Of The Proceeding 2
- B. The Impending Requirement To Terminate Sinclair's LMAs And Pending Court Appeal 9

II. Discussion 10

- A. Sinclair Will Suffer Irreparable Injury Absent Grant Of A Stay 10
- B. Sinclair Is Likely To Prevail On The Merits 13
  1. The Commission's Eight Voices Standard Violates The First Amendment 13
  2. The Commission's Eight Voices Standard Results In An Unconstitutional Taking In Violation Of The Fifth Amendment 15
  3. The Commission's Justification For Imposing The Eight Voices Standard Lacks Evidentiary Support And Is Arbitrary And Capricious. 17
- C. No Interested Party Would Suffer Harm If A Stay Were Granted 21
- D. The Public Interest Favors A Stay 21

Conclusion 22

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To: The Commission

EMERGENCY PETITION FOR STAY

Sinclair Broadcast Group, Inc. ("Sinclair"), by its attorneys and pursuant to §1.43 of the Commission's rules, hereby petitions the Commission to stay the requirement that Sinclair terminate by August 6, 2001,[1] local marketing agreements ("LMAs") in Columbus, Ohio, Dayton, Ohio, Charleston, South Carolina, and Charleston, West Virginia,[2] pending judicial review of the

1 Pursuant to the Commission's Report and Order in *In Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 91-221, FCC 99-209 (August 6, 1999), television LMAs entered into on or after November 5, 1996 that are attributable under the new attribution criteria and that would violate the TV duopoly rule are scheduled to terminate two years after the adoption date of the Report and Order. Because the two-year date after adoption of the Report and Order (August 5, 2001) falls on a Sunday, such LMAs are scheduled to terminate on Monday, August 6, 2001.

2 Sinclair has LMAs in these markets with the following stations: WRGT-TV, Channel 45, Dayton, Ohio, WTAT-TV, Channel 24, Charleston, South Carolina, WVAH-TV, Channel 11, Charleston, West Virginia, and WTTE(TV), Channel 28, Columbus, Ohio. Although Sinclair believes that the WTTE(TV) LMA is grandfathered until 2004, out of an abundance of caution it is including the WTTE(TV) in this Motion. Sinclair's position that the LMA predated November 5, 1996 (although technially executed on that date) is based on documents entered into in April 1996 which obligated Sinclair to enter into the WTTE(TV) LMA.

Commission's orders establishing that requirement in an appeal filed by Sinclair. *Sinclair Broadcast Group, Inc. v. FCC* (D.C. Cir., Case No. 01-1079), filed February 20, 2001. Grant of Sinclair's request will preserve the *status quo* and prevent irreparable injury resulting from termination of the LMAs until the question of whether the Commission may legally require the termination of these valuable contractual relationships can be authoritatively settled, and will cause no harm to other parties or to the public interest. *See Fox Television Stations, Inc. v. FCC*, No. 00-1222 (D.C. Cir. Apr. 6, 2001) (order granting stay and emergency motion to consolidate Nos. 01-1136 and 00-1222). Sinclair hereby provides notice that if the Commission fails to act on this Emergency Petition by May 18, 2001, Sinclair intends to file a stay motion with the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") on that date, so as to provide the court with sufficient time to prevent the irreparable injury resulting from termination of the LMAs.

I. Background

A. History of the Proceeding

In 1964, the Commission adopted a rule prohibiting the common ownership of two television stations whose Grade B contours overlapped. (Prior to that time, the Commission's rules had generally prohibited the common ownership of television stations serving "substantially the same area.")[3] The Commission based this so-called "TV duopoly rule" on its twin goals of "promot[ing] maximum diversification of program and service viewpoints" and "prevent[ing] undue concentration of economic power."[4] Significantly, however, the Commission offered no

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3 *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 45 FCC 1476 at n. 1 (1964).

4 *Id.* at ¶ 2.

empirical evidence that its rule would accomplish these goals, basing the rule instead on what it deemed to be "reasonable assumptions." The Commission said:

> When two stations in the same broadcast service are close enough together so that a substantial number of people can receive both, it is highly desirable to have the stations owned by different people. This objective flows logically from two basic principles underlying the multiple ownership rules. First, in a system of broadcasting based upon free competition, it is more reasonable to assume that stations owned by different people will compete with each other, for the same audience and advertisers, than stations under the control of a single person or group. Second, the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have "an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level."[5]

In 1991, recognizing the dramatic technological and competitive changes that had taken place in the video marketplace in the previous 25 years, the Commission launched this proceeding. The Commission noted:

> [T]elevision broadcasting now exists in an environment significantly more competitive than in years past and likely to be even more competitive in the years ahead. The statistics in this regard are well known. In 1975, the U.S. had three commercial broadcast networks and no cable networks; cable television was largely a broadcast retransmission medium. By 1990, there were over 100 national and regional cable networks and a major new broadcast network was developing. Cable subscribership rose from 17 percent of television households in 1975 to over 56 percent in 1990; cable now passes over 90 percent of television households. The number of broadcast stations increased by 50 percent over that 15 year period, with independent stations accounting for over three-fourths of that growth. The number of off-air stations available to the median household increased from six in 1975 to ten in 1990, and by 1990, 94 percent of television households were located in markets with five or more television stations. In 1975, home videocassette recorders (VCRs) were rare and there were no home satellite dish systems; in 1990, 69 percent of television households owned VCRs and three percent had home satellite dishes.
>
> This expansion in the availability of outlets and programming has markedly reduced the audience shares of the broadcast networks and their affiliates. The percentages of prime time viewing of the three major networks

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5 Id. at ¶ 3 (emphasis added, citation omitted).

> dropped from 73 percent in 1982-83 to 58 percent in 1989-90; viewing of cable-originated programming rose from 10 to 20 percent in that period. While each broadcast network still retains a prime time audience share roughly equal to that of all cable networks combined, it appears likely that satellite services such as direct broadcast satellite (DBS), increasingly well-financed cable programming services, and greater cable television channel capacity will perpetuate these trends of the last fifteen years into the 1990s.[6]

Thus, the television ownership proceeding was intended to be a forward-looking deregulatory initiative in recognition of a dramatically changing media environment.

During an eight-year rule making proceeding, the Commission was presented with overwhelming evidence that broadcasters were indeed competing with a plethora of fast-evolving programming and information sources, and that program diversity would be enhanced and competition unharmed by local market combinations. Moreover, numerous participants in the proceeding submitted detailed studies of existing same market TV/LMA combinations and other empirical evidence documenting the important public interest benefits of television combinations in smaller markets. Specifically, parties demonstrated that, in many markets, LMAs have aided in the resuscitation of marginal stations, and that LMAs have helped struggling stations to complete construction of or to upgrade their equipment and facilities. The evidence also established that LMAs allow smaller market stations to create new local newscasts and to add public affairs programming to their schedules, as well as to increase the economic viability of many smaller market stations by permitting them to take advantage of operating efficiencies.[7]

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6 *See Policy Implications of the Changing Video Marketplace, Notice of Inquiry,* 6 FCC Rcd 4961 at ¶¶ 3-4 (1991) (citation omitted).

7 *See, e.g., Local Marketing Agreements and the Public Interest: A Supplemental Report,* May 1998, submitted by Association of Local Television Stations ("ALTV"); *Local Marketing Agreements and the Public Interest,* attached to Reply Comments of ALTV filed March 21, 1997; Comments of Pegasus Communications Corporation, filed February 10, 1997; *Consolidated Comments of Sinclair Broadcast Group, Inc.*, MM Docket Nos. 91-221 and 94-150, filed February 7, 1997.

It is important to note that notwithstanding the duopoly rules, the Commission has repeatedly approved the use of local marketing agreements[8], and the public record contains ample support that LMAs are in the public interest. To the best of Sinclair's knowledge, there are no reported cases between 1991 and 2001 where the Commission rejected an LMA. During this time, the Commission never stated that television LMAs would be eliminated, nor has the Commission ever placed a freeze on new television LMAs. In fact, the Commission repeatedly upheld LMAs when challenged. In short, these arrangements were perfectly legal (i.e., non-attributable interests) under the FCC rules and were in compliance with the FCC's policy at the time. Accordingly, Sinclair and numerous parties to other LMAs reasonably structured their business arrangements relying on the Commission's affirmative policy supporting such agreements.

Moreover, while this proceeding was taking place, Congress addressed LMAs in the Telecommunications Act of 1996 (the "Telecom Act"), enacted February 8, 1996.[9] Section 202(g) of the Telecom Act provides that "[n]othing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission."[10] The Conference Report accompanying the Act stated: "[Section 202(g)] grandfathers LMAs currently in existence upon enactment of this legislation and allows LMAs in the future, consistent with the Commission's rules. The

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8 *See, e.g., Siete Grande Television, Inc.*, 11 FCC Rcd 21154, 21156 (MMB 1996), *WGPR, Inc.*, 10 FCC Rcd 8140 (1995); *Gisela Huberman Esquire*, 6 FCC Rcd 5397 (MMB 1991); *J. Dominic Monohan, Esquire*, 6 FCC Rcd 1867 (MMB 1991); *Peter D. O'Connell Esquire*, 6 FCC Rcd 1869 (MMB 1991); *Brian M. Madden, Esquire*, 6 FCC Rcd 1871 (MMB 1991). *See also*, Letter from Barbara Kreisman, Chief Video Services Division, Mass Media Bureau, to WLOS Licensee, Inc., *et al.* (June 27, 1997).

9 Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(g), 110 Stat. 56 (1996).

10 *Id.*

conferees noted the positive contributions of television LMAs and this subsection assures that this legislation does not deprive the public of the benefits of existing LMAs that were otherwise in compliance with Commission regulations on the date of enactment."[11] The conferees further stated: "Subsection 202(c)(2) of the Telecom Act directs the Commission to conduct a rulemaking proceeding to determine whether its rules restricting ownership of more than one television station in a local market should be retained, modified or eliminated. It is the intention of the conferees that, if the Commission revises the multiple ownership rules, it shall permit VHF-VHF combinations only in compelling circumstances."[12] None of Sinclair's LMAs involve VHF-VHF combinations.

Faced with the evidence presented by those filing comments in the proceeding, the Commission was forced to acknowledge that "[t]he record reflects that there has been an increase in the number and types of media outlets available to local communities"[13] as well as that:

> The record in this proceeding shows that there are significant efficiencies inherent in joint ownership and operation of television stations in the same market, including efficiencies related to the co-location and sharing of studio and office facilities, the sharing of administrative and technical staff, and efficiencies in advertising and news gathering. These efficiencies can contribute to programming and other benefits such as increased news and public affairs programming and improved entertainment programming, and, in some cases, can ensure the continued survival of a struggling station.[14]

Nevertheless, in spite of this evidence and the statements of Congress in connection with the Telecom Act, the Commission concluded that only what it termed "measured relaxation" of the

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11 S. Conf. Rep. 104-230, 104th Cong. 2d Sess. 163,164 (1996).

12 *Id.* at 163.

13 *Review of the Commission's Regulations Governing Television Broadcasting,* 14 FCC Rcd 12903 (1999) (*Local Ownership Order)* at ¶¶ 7, 37, *on recon.*, FCC 00-431 (rel. Jan. 19, 2001) (*Local Ownership Reconsideration Order*).

14 *Local Ownership Order* at ¶ 57 (citations omitted).

TV duopoly rule was appropriate due to the supposed "important diversity and competition issues at stake" as well as the "rapid change and increasing consolidation" taking place in the communications industry. Thus, the rule adopted by the Commission permitted common ownership of two television stations within the same Designated Market Area ("DMA") and with overlapping Grade B signal contours only if (a) at least eight independently owned and operating full-power television stations would remain in the DMA following the proposed combination; and (b) the two merging stations were not both among the top four-ranked stations in the market, as measured by audience share.[15] (This new restriction on ownership is hereinafter referred to as the "eight voices standard.") The Commission further ordered that television LMAs entered into on or after November 5, 1996 would have two years from the adoption date of the Report and Order (*i.e.*, until August 6, 2001) to come into compliance with the rules adopted in the Report and Order or to terminate. The Report and Order announced that LMAs entered into before November 5, 1996 would be "grandfathered" until the conclusion of the FCC's 2004 biennial review.[16]

In a companion proceeding decided the same day, the Commission determined that it would count any television station brokered pursuant to an LMA by the licensee of another television station in the same DMA toward the brokering licensee's television ownership limits.[17] Thus, a television licensee that owned one station and provided programming to another station in

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15 *Id.* at ¶ 64. To be counted as an independent voice in the market, a station's Grade B contour must overlap the Grade B contour of at least one of the stations in the proposed combination. *Local Ownership Reconsideration Order* at ¶ 17.

16 *Local Ownership Order,* at ¶133. While Sinclair believes that the Commission's decision to phase out pre-November 5, 1996 LMAs is contrary to congressional intent, unconstitutional, and arbitrary and capricious, the instant Emergency Petition focuses on the more immediate forced termination of post-November 5, 1996 LMAs.

17 *See Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests,* 14 FCC Rcd 12559 (1999).

the same market pursuant to an LMA would be treated as if it owned both stations for purposes of the multiple ownership rules, including the TV duopoly rule. If the combination of stations would violate the new "eight voices standard," parties to an LMA entered into on or after November 5, 1996, the adoption date of the *Second Further Notice of Proposed Rule Making* in this proceeding, were, as noted above, required to terminate the relationship by August 6, 2001.

As it did when it first adopted the TV duopoly rule more than three decades ago, the Commission relied on its *intuition* in deciding to limit common ownership of two television stations in a market to situations in which eight independent voices would remain. The Commission said: "[W]e think intuitive logic and common sense support our belief that the identity and viewpoint of a station's owner can in fact influence the station's programming."[18] The Commission ignored the uncontroverted evidence that a plethora of sources including cable and other media, such as daily newspapers, Direct Broadcast Satellite (DBS), multichannel multipoint distribution service (MMDS), and the Internet, were competing with television as sources of information and should therefore be counted as media voices in the market. The Commission offered no explanation of how its selection of eight voices as a standard, as opposed to any other standard such as five or twelve, was designed to protect or enhance diversity and competition. Instead, the Commission baldly stated that "the eight voice standard we adopt today strikes what we believe to be an appropriate balance between permitting stations to take advantage of the effectiveness of television duopolies while at the same time ensuring a robust level of diversity."[19] The Order did not refer to any studies supporting the choice of the number eight or describe how the Commission arrived at that particular number. In rejecting requests for reconsideration of the

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18 *Id.* at ¶ 22.

19 *Id.* at ¶ 67.

rule, the Commission offered no further explanation, merely reiterating its prior statements and summarily concluding, "We continue to believe that drawing the line at eight reasonably balances the competing interests at stake."[20]

In contrast, at the same time and in the very same Report and Order in which the Commission established the eight voices standard as the standard for television duopolies, the Commission adopted rules for radio-television cross ownership that counted as voices not only independently owned and operating full-power television stations, but also all independently owned and operating radio stations, and independently owned daily newspapers published in the DMA and having a circulation exceeding 5% in the DMA. In addition, the Commission announced that for purposes of the radio-television cross ownership rule, it would count as a single voice, wired cable service, provided that cable service is generally available in the DMA.[21]

B. The Impending Requirement to Terminate Sinclair's LMAs and Pending Court Appeal

Sinclair petitioned for review of the *Local Ownership Order* in the D.C. Circuit on the grounds that the Commission's new TV duopoly rule violates the First and Fifth Amendments of the United States Constitution and is arbitrary, capricious, and otherwise contrary to law. *See Sinclair Broadcast Group, Inc. v. FCC* (Case No. 01-1079), filed February 20, 2001. Because Sinclair is the time broker, pursuant to LMAs entered into on or after November 5, 1996, of television stations in several markets in which it also owns a station, it is subject to the requirement in the *Local Ownership Order* that it terminate these contractual relationships by August 6, 2001. In light of its pending court appeal, Sinclair now requests the Commission to

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20 *Local Ownership Reconsideration Order* at ¶ 6.

21 *Id.* at ¶ 111.

stay the effectiveness of the required termination until the court has completed its review of the *Local Ownership Order*.

II. Discussion

In determining whether a stay is warranted, the courts and the Commission consider: (1) the threat of irreparable harm to the petitioner absent grant of the stay; (2) the likelihood that the petitioner will prevail on the merits; (3) the harm to other parties from grant of the stay; and (4) the harm to the public interest should the stay be granted. *See Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). To show that a stay should be granted, Sinclair need not establish that it has a certainty of success on the merits of its appeal. Rather, "it will ordinarily be enough that the [petitioner] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Id.* at 844 (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953). Under this standard, there can be no doubt that Sinclair is entitled to a stay of the requirement that it terminate LMAs pending its appeal of the *Local Ownership Order*.

A. Sinclair Will Suffer Irreparable Injury Absent Grant of a Stay

Absent a stay, Sinclair will be forced to terminate by August 6, 2001, LMAs with four television stations in the Columbus, Ohio; Dayton, Ohio; Charleston, South Carolina; and Charleston, West Virginia markets. Sinclair has invested millions of dollars in these stations to enable them to air quality programming, including local news and public affairs programs, and to institute improvements in their facilities. Sinclair has instituted these changes based on the expectation that it would realize a return on its investment over the long term in the form of significant economies of scale. Once its contractual relationships with these stations are terminated, however, the value of Sinclair's prior investment is dramatically affected. Indeed, Sinclair will be *penalized* for its efforts to create effective additional voices in the market, and neither the court nor the Commission would be able to compensate Sinclair or the public for the loss. Nor could Sinclair expect to simply reenter the relationships or similar relationships with comparable stations in these markets should the TV duopoly rule ultimately be overturned. See Declaration of David B. Amy attached hereto as Exhibit A. Moreover, even if Sinclair could resume its existing relationships in the future, its loss in the interim of goodwill, market efficiencies, and its investment could not be recouped.

As both the Commission and the courts have recognized, the forced withdrawal of a company from an important segment of its business constitutes irreparable harm. *See WMATA v. Holiday Tours*, 559 F.2d at 843 (irreparable harm to tour operator found in the "destruction in its current form as a provider of bus tours," though operator could have continued to provide limousine tours); *CBS Communications Services., Inc.,* 13 FCC Rcd 4471 at ¶ 19 (1998) (irreparable harm found where wireless carrier would suffer substantial disruption of its business in one of its markets). Indeed, in a similar case, the D.C. Circuit recently granted a stay of the forced divestiture by Viacom Inc. and CBS Broadcasting Inc. (collectively, "Viacom") of television stations that reach approximately 6% of national television households. *See Fox Television Stations, Inc. v. FCC,* No. 00-1222 (D.C. Cir. Apr. 6, 2001) (order granting stay and emergency motion to consolidate Nos. 01-1136 and 00-1222). The harm asserted by Viacom in that case is far less compelling than the harm that will befall Sinclair absent grant of the instant stay request. Viacom received a stay because it has an appeal pending of the 35% national cap on television ownership – an established rule that Viacom knew about. On the other hand, when Sinclair entered into the LMAs, they were entirely permissible and there was no rule precluding them. The Commission's August 5, 1999 action reversed past precedent. Sinclair made lawful business decisions based upon the prior decisions of the expert agency. While Sinclair would not be completely ousted from any of its markets, it would suffer substantial disruption of its business operations in those markets. The brokered stations each broadcast programming different from that broadcast on Sinclair's owned station in the market in an effort to serve varied demographic groups. Thus, forced termination of these relationships will destroy a significant part of Sinclair's business.

Moreover, as time broker of the stations, Sinclair exercises editorial discretion in selecting the programming aired during periods that it brokers the stations that is made available for broadcast to the public. Forced termination of the LMAs would preclude Sinclair from exercising this discretion. Thus, the forced termination requirement "interferes with [Sinclair's] speech rights by restricting the number of viewers to whom [it] can speak." *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1129 (D.C. Cir. 2001) ("*Time Warner II*").[22] This unconstitutional infringement on Sinclair's freedom of speech itself unquestionably constitutes irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Finally, the LMAs Sinclair has entered into are business contracts that constitute the property of the parties to the agreements. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1985) (contractual rights are property rights). Thus, the FCC's voiding of Sinclair's LMAs is an unconstitutional taking of property without justification or compensation in violation of the Takings Clause of the Fifth Amendment; and "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2nd Cir. 1984) (citations omitted); *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960) (in race discrimination case, court

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[22] The FCC did not seek rehearing or rehearing *en banc* of *Time Warner II*, and its time to do so expired on April 16, 2001.

had "no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right"); *Planned Parenthood v. Citizens for Com. Action*, 558 F.2d 861, 867 (8th Cir. 1977) (interference with constitutional rights is considered irreparable injury).

B. Sinclair is Likely to Prevail on the Merits

Sinclair will likely prevail on the merits of its claims. The eight voices standard of the TV duopoly rule fails to advance any important governmental interest unrelated to the suppression of free speech. Even assuming *arguendo* that the standard advanced an important governmental interest (a position with which we disagree), it also burdens substantially more speech than necessary. Accordingly, the standard violates the First Amendment. *See Time Warner II,* 240 F.3d at 1129. Moreover, the standard, pursuant to which the Commission has required the termination of Sinclair's post-November 5, 1996 LMAs, results in an unconstitutional taking of Sinclair's property in violation of the Fifth Amendment. Finally, the Commission's rationale for imposing the eight voices standard is arbitrary and capricious, lacking any basis in the record.

The D.C. Circuit's recent decision in *Time Warner II* setting aside the Commission's horizontal cap on cable television ownership and its recent grant of Viacom's stay request strongly suggests that the eight voices standard will not withstand judicial review. As in *Time Warner II*, the Commission's adoption of the eight voices standard is based solely on conjecture and speculation and, indeed, is directly at odds with the evidentiary record.

1. The Commission's Eight Voices Standard Violates the First Amendment

As the Commission has acknowledged, its ownership restrictions will be sustained under the First Amendment only if they advance important governmental interests unrelated to the suppression of free speech and do not burden substantially more speech than is necessary to further those interests. *See Local Ownership Order* at ¶ 24 n.49; *see also Turner I; Time Warner*

II.[23] Yet the Commission's stringent ownership restrictions fail to advance any important governmental interest unrelated to the suppression of free speech. Indeed, as participants in the local television ownership rule making proceeding amply demonstrated, the Commission's asserted interest in promoting diversity of viewpoints and competition is not advanced but, in many cases, is substantially harmed by the restrictions. The Commission has offered no evidence to show otherwise.[24]

Moreover, the restriction burdens substantially more speech than necessary to further any interests identified by the Commission. While ignoring the overwhelming record evidence of the substantial benefits of duopoly in smaller markets and Congressional statements about the benefits of LMAs, the Commission itself provided no evidence nor offered any explanation for its choice of eight voices as opposed to five, twelve or another number. In similar circumstances, where the Commission sought to impose a ban on cross-ownership of a telephone and a cable company, courts found that the ownership restriction violated the First Amendment due to the lack of evidence that the restriction would accomplish its stated goals as well as the overinclusiveness of the ban. *See US West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1994) (finding cross-ownership ban unconstitutional because of insufficient evidence demonstrating that the ban would foster competition in the cable industry or promote programming diversity and

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23 Even under the level of scrutiny afforded broadcasting by *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Commission has offered no rational basis for such stringent restrictions on television ownership.

24 The Commission did reference two studies purportedly supporting its belief that ownership diversity would promote diverse viewpoints. *See Local Ownership Order* at ¶ 22 n.46, citing Jeff Dubin & Matthew Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. Cal. L. Rev. 841 (May 1995), Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus* (June 1988). However, these studies (both of which rely on the same underlying data), consider only the effect of the race and gender of broadcast owners on programming content. Neither purports to support the larger proposition that more owners will create diverse editorial viewpoints.

because less restrictive means of achieving diversity were available); *Chesapeake & Potomac Tel. Co. v. United States,* 42 F.3d 181 (4^{th} Cir. 1994) (finding cross-ownership ban unconstitutional where "FCC's reasoning does not indicate that attention was devoted to the possibility of other, less drastic regulatory schemes . . . ."). Just recently, in *Time Warner II,* the D.C. Circuit struck down the 30% cable horizontal ownership cap for these same reasons.

2. The Commission's Eight Voices Standard Results in an Unconstitutional Taking in Violation of the Fifth Amendment

The Commission's decision to apply the eight voices standard so as to eliminate existing LMAs is an unconstitutional taking without justification or compensation. The Takings Clause of the Fifth Amendment prohibits the government from taking private property "for public use, without just compensation." It is well settled that contractual rights are property rights, the appropriation or destruction of which can rise to the level of an illegal taking by the government. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1985).[25] Local marketing agreements are business contracts that constitute the property of the parties to these agreements. By voiding these contracts, the Commission's regulations act as a taking of the parties' property.

"[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Although there is no set formula for determining if a regulation has gone "too far," the courts make such determinations on a case-by-case basis. Generally, three factors are used to determine whether a regulation is a taking of property, namely: (1) the economic impact of the regulation on the

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25 *See also, United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16; *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (recognizing that "[a]lthough takings problems are more commonly presented when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good, economic regulation . . . may nonetheless effect a taking.")

claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Connolly,* 475 U.S. at 225.

The economic impact on Sinclair of the Commission's decision to apply the eight voices standard to parties' LMAs entered into on or after November 5, 1996 is draconian. The uncertainty caused by the impending deadline has raised a number of concerns from investors, lenders and station personnel. The LMAs to which Sinclair is a party have an initial term of at least five years with a five-year renewal. Sinclair determined that a ten-year period was necessary in order to recoup the expenses involved and provide the company with a reasonable rate of return on its investment.

The early termination of the LMAs denies Sinclair economic restitution for its investment in equipment and programming designed to enhance program diversity. *See* Declaration of David B. Amy, attached as Exhibit A. Thus, the new rule interferes with reasonable investment backed expectations as it undermines the reliance of broadcasters such as Sinclair, the public, and the investment community on these types of contractual agreements. Financial institutions and public shareholders have invested funds in the television industry in reliance on the fact that the Commission's rules permit LMAs. Similarly, banks have loaned money, and institutions and individuals have invested in public media companies, in the expectation that the LMAs into which those companies have entered would enhance cash flow over the full life of the contractual agreement. Finally, while the Commission's decision does not physically invade or permanently appropriate broadcasters' property, the termination requirement voids post-November 5, 1996 LMAs, thereby completely depriving the parties to these contracts of any benefits. In sum, the parties to an LMA have entered into a contract that forms an important asset of the respective companies; for the Commission to simply void such agreements is a taking of the parties' property without just cause or compensation.

3. The Commission's Justification for Imposing the Eight Voices Standard Lacks Evidentiary Support and is Arbitrary and Capricious

The Commission's adoption of the eight voices standard in the *Local Ownership Order* is an arbitrary and capricious decision, lacking any rational basis or support. Under the Administrative Procedure Act, an agency's actions, findings or conclusions may be set aside if they are found to be, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. Sec. 706(2)(A). Furthermore, as the Supreme Court has held, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Inc. Co.*, 463 U.S. 29, 43 (1983) (*quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). In other words, an agency must "offer a reasoned explanation that is supported by the record." *AT&T v. FCC*, 974 F.2d 1351, 1354 (D.C.Cir. 1992). The Commission's summary rejection of the record evidence and adoption of a standard for which it offered no reasoning or insight beyond its supposed intuition cannot withstand this test. Indeed, Sinclair has reason to believe that the number "eight" was selected for the purpose of injuring Sinclair.[26]

The Commission's decision to adopt the eight voices standard was based solely on conjecture and intuition. The Commission failed to provide a reasoned analysis or indeed to offer any explanation of how it arrived at its conclusion that eight voices would protect or otherwise create an acceptable level of market diversity while five voices or some other number would not, nor did the Commission establish any relationship between the number selected and the varying

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[26] *See* Exhibit B, Letter from Martin R. Leader, Counsel for Sinclair, to William E. Kennard, Chairman, Federal Communications Commission (Dec. 15, 1998).

characteristics of the markets to which that number would be applied. The Commission also failed to cite any studies, statistics, or other empirical evidence to support its conclusions. Instead, the Commission baldly offered its "belief" that the eight voice standard struck "an appropriate balance" between competing interests. *Local Ownership Order* at ¶ 67; *see also Local Ownership Reconsideration Order* at ¶ 6. The D.C. Circuit's action in *Time Warner II* as well as the court's action granting the stay in *Fox Television Stations, Inc. v. FCC*, No. 00-1222, demonstrate that such a justification is wholly inadequate especially in light of the detailed and uncontradicted record evidence. The record is replete with studies, anecdotal evidence, and other empirical evidence documenting the important public interest benefits that same market combinations have brought about in smaller markets as well as the harms that would be experienced in many of these markets if such combinations were forbidden. The Commission offered no explanation of its rejection of this evidence.

Each market and each television station within a market, with its particular audience reach and demographic niche is unique. In evaluating whether broadcast LMAs pose antitrust problems, the Antitrust Division of the Department of Justice takes into account the particular characteristics of the market at issue. And as Sinclair has argued previously, television duopolies should be permitted subject to the decision of the Justice Department's Antitrust Division, and the FCC should not substitute its intuitive views for the informed expert judgement of the Department of Justice. *See, e.g.*, Sinclair Petition for Reconsideration at 11. Unlike the FCC, the DOJ does not have a bright-line test but rather studies each situation. In contrast, the FCC's eight voices standard presumes unrealistically that all markets are alike. In reviewing cases to determine whether there will be "eight voices" left, the FCC mistakenly treats Charleston, South Carolina like Baltimore, Maryland, or like Dayton, Ohio. In the case of Dayton, Ohio, for example, the residents of Dayton are also served by various Cincinnati stations, newspapers and cable systems (although Cincinnati is a separate DMA). Thus, residents of Dayton have the benefit of far more "voices" coming into the market, including newspaper "voices" than, for example, Charleston, South Carolina. The "one size fits all" approach which the "eight voices" standard represents has no relation to the economic characteristics of varying communities and is fundamentally unsound.

In addition, the Commission's explanation for its failure to count other non-television voices that are available in the market, such as cable television, DBS, MMDS, daily newspapers, and the Internet, was wholly inadequate.[27] This decision not to count other media as a voice in applying the eight voices standard conflicts with the FCC's conclusion in 1984 that all these media are substitutes. Specifically, the Commission stated in *In the Matter of Amendment of Section 73.3555,* 100 FCC 2d 17, 25 (1984):

> The record in this proceeding supports the conclusion that the information market relevant to the diversity concerns includes not only TV and radio outlets, but cable, other video media and numerous print media as well. In the Notice we took account of the fact that these other media compete with broadcast outlets for the time that citizens devote to acquiring the information they desire. That is, cable newspapers, magazines and periodicals are substitutes in the provision of such information.

Given that the number of these media outlets and additional sources of information have increased exponentially since 1984, the Commission's decision not to include these non-television voices in a local market is inexplicable.

In the *Local Ownership Reconsideration Order*, the Commission offered the following purported explanation:

> Broadcast TV has the power to influence and persuade unmatched by other media. In terms of our diversity goal, we emphasize that TV is the dominant source of news and information for Americans, and in the world of television, broadcast TV stations are the dominant source of *local* news

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27 In acknowledgment of the fact that DBS is a significant competitor of cable television, the Commission's Cable Horizontal Ownership and Attribution Rules included nationwide subscribers of DBS and other multi-channel video programming distributors (MVPDs) in the calculation of total horizontal ownership. *See Cable Horizontal Ownership Rule, Report and Order*, MM Docket No. 92-264, FCC 99-288 (released October 8, 1999).

> and information. Other video programming distributors, such as cable and DBS, typically do not serve as *independent* sources of local information. . . . .[28]

This contention is unsupported and completely at odds with the record evidence, which demonstrated, *inter alia*, that basic cable networks, which include numerous cable news channels, now have a combined audience rating and share close to the combined ratings and share of the big four broadcast television networks and that the Internet is quickly becoming the primary source of news for regular Internet users.[29] Of course, it is beyond argument that local daily newspapers are sources of local news.

Moreover, the Commission's rationale is inconsistent with its treatment of non-television voices in its radio-television cross ownership rule, which counts independently owned and operating commercial and noncommercial radio stations, daily newspapers, and cable television systems in addition to television stations. The Commission provided no rationale justifying the creation of two radically different tests -- one for radio-television cross ownership and the other for television duopolies. Similarly, the Commission's failure to count daily newspapers as a voice is particularly anomalous given the fact that the Commission has a newspaper/television cross ownership rule (47 C.F.R. § 73.3555 (d)) and will not grant a license for an AM, FM or TV broadcast station to a party that owns a daily English-language newspaper within the principal

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[28] *Local Ownership Reconsideration Order* at 22 (emphasis in original).

[29] *See Bear Stearns, Cable & Broadcast March 1999* at 102; *Electronic Media*, September 27, 1999 at 1, 44 (reporting results from survey from Frank N. Magid & Associates). The only support for the Commission's position came from a 1997 survey titled "America's Watching" by Roper Starch Worldwide, Inc., which reported that almost 70% of adults claim to get most of their news from television. Although this survey is fairly recent, it actually pre-dated widespread acceptance of the Internet. Moreover, as participants in the local television ownership proceeding pointed out, it is unclear whether the survey, which was sponsored by the ABC, CBS, and NBC television networks, distinguished between broadcast television and cable television or between national and local news.

city contour of the broadcast station. Once again, the Commission's decision lacks any rational basis and is arbitrary and capricious.

Finally, the decision to count only television voices in the eight voices standard is at odds with prior Commission and Supreme Court findings. In 1984, the Commission recognized that "the information market relevant to diversity concerns includes not only TV and radio outlets, but cable, other video media, and numerous print media as well." *Amendment of § 73.3555*, 100 FCC2d 17, 25 (1984). In *Turner I,* the Supreme Court recognized that cable television was a conduit for numerous voices, stating, "[o]nce the cable operator has selected the programming sources, the cable system functions, in essence, as a conduit for the speech of others." The Commission did not and cannot provide any reason for ignoring these sound findings.

C. No Interested Party Would Suffer Harm if a Stay Were Granted

No interested party will be harmed by grant of the instant stay request. Grant of the stay will simply preserve the *status quo* until the D.C. Circuit has a chance to act on Sinclair's appeal. This case is similar in all relevant respects to *Fox Television Stations, Inc. v. FCC,* No. 00-1222, in which the D.C. Circuit recently stayed the forced divestiture of certain of Viacom's television stations.

D. The Public Interest Favors a Stay

The public interest will be served by grant of a stay pending appeal. Sinclair has raised serious constitutional concerns and has otherwise raised serious doubts regarding the validity of the TV duopoly rule. The public interest will not be served if Sinclair is forced to terminate valuable contractual relationships based on unconstitutional or otherwise illegal requirements.

Conclusion

For the foregoing reasons, Sinclair respectfully requests that the Commission grant the requested stay.

Respectfully submitted,

SINCLAIR BROADCAST GROUP, INC.

By: Martin R. Leader

Martin R. Leader
Kathryn R. Schmeltzer
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Its Attorneys

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Dated: May 4, 2001

EXHIBIT A

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8
	)	

DECLARATION OF DAVID B. AMY

Pursuant to 28 U.S.C. § 1746, David B. Amy, under penalty of perjury, states s follows:

1. I am currently Executive Vice President and Chief Financial Officer o Sinclair Broadcast Group, Inc., a position that I have held since March 2001. Prior to that tim , I served as Executive Vice President of Sinclair since September 1999 and as Vice President a d CFO of Sinclair since October 1994. In addition, I serve as Secretary of Sinclair Communicat ons, Inc., the Sinclair subsidiary which owns and operates the broadcasting operations. Prior to his appointment, I served as Corporate Controller of Sinclair beginning in 1986. I have o er sixteen years of broadcast experience.

2. I have personal knowledge of the facts stated in this declaration.

3. During the course of my duties at Sinclair, I have had extensive experie ce with local marketing agreements ("LMAs") and with the market for the acquisition of televi ion stations in television markets of varying sizes.

4. Sinclair has entered into LMAs with the four following stations (among others); WRGT-TV, Channel 45, Dayton, Ohio; WTAT-TV, Channel 24, Charleston, South Ca olina; WVAH-TV, Channel 11, Charleston, West Virginia; and WTTE(TV), Channel 28, Col mbus,

Ohio. Under current Federal Communications Commission ("FCC") rules, Sinclair will be forced to terminate these four LMAs by August 6, 2001, unless the requirement is stayed by the FCC or a court, although I understand there may be a legal issue as to whether the LMA with WTTE(TV) can be maintained until a later date.

5. Sinclair has invested millions of dollars in these stations to enable them to air quality programming, including local news and public affairs programs, and to institute improvements in their facilities.

6. Sinclair has instituted these changes based on the expectation that it will realize a return on its investment over the long term in the form of significant economies of scale. The LMAs to which Sinclair is a party have an initial term of at least five years with a five year renewal period. Sinclair determined that the ten year period of time was necessary in order to recoup the expenses involved and provide the Company with a reasonable rate of return on its investment. The early termination of the LMAs will dramatically affect the economic restitution for Sinclair's investment in equipment and programming designed to enhance program diversity. Once its contractual relationships with these stations are terminated, Sinclair's prior investment will be dramatically affected. Even if Sinclair could resume its contractual relationships in the future, its loss in the interim of goodwill, market efficiencies and its investment could not be recouped.

7. Each market and each television station within a market, with its particular audience reach and demographic niche, is unique. In my experience, if a station group were forced to terminate an LMA with a particular station, there would be relatively little likelihood that the group would be able to re-enter the market by doing a new LMA with that station or with a comparable one.

8. Accordingly, the forced divestiture of the four LMAs would, in all lik ihood, permanently deprive Sinclair of a unique position in the market and exclude it from tl at position for all time.

I declare under penalty of perjury that the foregoing is true and corrected. Ex uted on May 4, 2001.

David B. Amy

EXHIBIT B

EX PARTE OR LATE FILED

MM 91-221

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December 15, 1998

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Hon. William E. Kennard
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Dear Chairman Kennard:

Recent articles in the trade press have quoted "an aide to one of the commissioners" and "several FCC staffers" as stating that "LMA's are violating the rules," "no one talks about how they have been inappropriately used to build up massive market control by entities such as Sinclair [Broadcasting]," and that "we were trying to find a number [cutoff dates] that would include as many of Sinclair acquisitions as possible, but not destroy longstanding arrangements." (This latter comment was from one candid FCC aide.) The comments indicate a lack of understanding of the economic impact of LMA's. These comments could also be interpreted by some as trying to damage the public value of Sinclair.

As you know, nearly all of the LMA's to which Sinclair is a party have been approved by the Commission. Those LMA's to which Sinclair is a party which were not approved by the Commission and which did not require Commission approval were patterned after those which have been approved by the Commission. Additionally, nearly all of the LMA's to which Sinclair is a party have been reviewed and approved by the Anti-Trust Division of the United States Department of Justice.

Although Sinclair does not know who at the FCC made these prejudicial comments or whether they were officially authorized, it is apparent that some at the Commission have a clear and distinct bias toward Sinclair. We request that you remind the staffs of the other Commissioners and the FCC Mass Media Bureau staff that they should refrain from publicly expressing their personal opinions regarding FCC applicants and license holders and from making such inflammatory statements which might harm Sinclair.

Sincerely,

Martin R. Leader

Martin R. Leader

cc: Hon. Susan Ness
Hon. Harold W. Furchtgott-Roth
Hon. Michael K. Powell
Hon. Gloria Tristani
Roy Stewart, Esq.

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CERTIFICATE OF SERVICE

I, Lisa Sorum, a secretary with the law firm Shaw Pittman, hereby certify that a true and correct copy of the foregoing Emergency Petition For Stay was served by mail, this 4th day of May 2001, to the following:

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Lisa Sorum

*By Hand Delivery